

Landry's Tells 5th Circ. \$20M Data Hack Was A 'Publication'

By **Katie Buehler**

Law360 (June 10, 2021, 5:57 PM EDT) -- A Fifth Circuit panel grappled Thursday with whether a credit card data breach involving Houston-based hospitality chain Landry's Inc. constituted a "publication" that would trigger its insurer's obligation to defend it in a \$20 million lawsuit brought by JPMorgan Chase.

The three-judge panel launched a barrage of questions to determine how broadly to define "publication" in the case. Landry's argued for a wide-reaching meaning that included any transmission of data from one party to another, while the Insurance Co. of the State of Pennsylvania, or ICSOP, contended that publication required an intent to make the information publicly available.

If the panel accepts Landry's definition, the company argues the data breach would fall under ICSOP's coverage for damages arising from an "oral or written publication, in any manner, that violates a person's right of privacy," and the insurer would have to fund Landry's defense against claims filed by JPMorgan and its card payment processing arm, Paymentech LLC.

A Texas federal court rejected Landry's definition in May 2019, ruling ICSOP's policies weren't designed to cover a data breach. Landry's appealed that decision a month later.

During oral arguments Thursday, a circuit judge offered up a hypothetical, asking ICSOP's attorney, Laura A. Foggan of Crowell & Moring LLP, whether it would be a publication if a Landry's employee wrote down credit card numbers and related security codes and expiration dates on a piece of paper and tacked it onto a bulletin board outside the bathroom.

Foggan said the hypothetical situation would be considered a publication of the information, but the data breach didn't meet the same conditions. The data breach involved a theft by hackers, not a publication.

"What was meant to be a private transaction was hacked," she said.

Landry's attorney Andrew W. Guthrie of Haynes and Boone LLP countered, arguing it's still a publication even if Landry's didn't intend to give the hackers the information.

"Whether it was intentional or not, we have the transmission of the data to the hackers," he said, adding that is "sufficient to trigger the publication prong."

According to court documents, JPMorgan and Paymentech's suit against Landry's stems from a December 2008 merchant payment card processing agreement with the hospitality company, which operates a host of hotels, casinos and popular restaurant chains, including Bubba Gump, Rainforest Cafe and Claim Jumper. Landry's agreed to abide by all payment brand rules, including Visa's Global Compromised Account Recovery and MasterCard's Account Data Compromise programs for large-scale credit card data breaches.

Landry's then provided notice of termination of the agreement in October 2015, but it was still contractually obligated to reimburse Paymentech for any fines and penalties if the payment companies imposed assessments on Paymentech as a result of any investigations into a data breach, according to court documents.

In December 2015, Paymentech discovered a credit card data compromise at Landry's properties across 14 different brands. An investigation showed that a breach compromised millions of credit card accounts from May 2014 through December 2015, and Landry's acknowledged the data breach in a December 2015 news release, according to court documents.

Visa and MasterCard representatives then probed the breach and found that Landry's had failed to comply with the payment brand rules, including the security guidelines, and information that included cardholder names, card numbers, expiration dates and internal verification codes was compromised.

Following the breach, Paymentech said it was forced to pay Visa and MasterCard \$20 million in assessments to cover fraudulent payment card transactions and other expenses, and it is now seeking to pass the buck to Landry's.

U.S. Circuit Judges Jerry E. Smith, James C. Ho and Andrew S. Oldham sat on the panel for the Fifth Circuit.

Landry's is represented by Micah E. Skidmore, Benjamin L. Mesches and Andrew W. Guthrie of Haynes and Boone LLP.

ICSOP is represented by Laura A. Foggan of Crowell & Moring LLP, and Ellen Van Meir and Mariah B. Quiroz of Nicolaides Fink Thorpe Michaelides Sullivan LLP.

The case is Landry's Inc. et al. v. the Insurance Co. of the State of Pennsylvania, case number 19-20430, in the U.S. Court of Appeals for the Fifth Circuit.

--Additional reporting by Jeff Sistrunk and Michelle Casady. Editing by Adam LoBelia.